Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JEANELL THORTON,

Petitioner,

v.

TOMMY G. THOMPSON, Secretary of the Department of Health and Human Services,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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ISSUES PRESENTED

Whether Respondent failed to articulate a legitimate business reason to rebut Petitioner's *prima facie* case when it provided no explanation for not processing the valid application of Petitioner.

Whether an employee must provide additional evidence of discrimination when the employer's proffered reason involves its own process which it did not follow and which is totally under its control.

LIST OF PARTIES, PARENT COMPANIES AND PARTLY OWNED SUBSIDIARIES

The names of the only two parties in this action are contained in the caption of the case.

The parties are a private individual and a federal government agency. Thus, no parent company nor a company owning 10% or more of stock exists.

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OPINION BELOW

The Eleventh Circuit Court of Appeals did not select its opinion for publication in the Federal Reporter. It is reprinted in the Appendix at App. 1. The District Court did not publish an opinion in this case. It is reprinted in the Appendix at App. 12.

JURISDICTION

The Eleventh Circuit filed its decision on April 19, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e-16

All personnel actions affecting employees or applicants for employment . . . in executive agencies as defined in § 105 of Title 5 . . . shall be made free from any discrimination based on race, color, religion, sex or national origin.

29 U.S.C. § 633a

All personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . in executive agencies as defined in § 105 of Title 5 . . . shall be made free from any discrimination based on age.

STATEMENT OF THE CASE

Petitioner Jeanell Thornton, born on November 23, 1944, began her career as a federal employee with the Office of Economic Opportunity in 1967, as a GS-3 clerk typist. Magistrate Judge King's Report, pp. 2-3, Appendix 13. Petitioner remained employed at OEO until it was abolished in 1981. During her tenure at OEO, Petitioner received promotions elevating her to the rank of GS-12. *Id.* at 3.

In 1991, Petitioner Thornton was hired by the Department of Health and Human Services in the Atlanta Regional Office of the Inspector General. Her position as a GS-5 audit clerk was located in the Office of Audits. Approximately two (2) years later, Petitioner Thornton was promoted to a GS-6 position in the Office of Audits. *Id.* Petitioner Thornton retired from the federal service on October 1, 2000. *Id.*

The Atlanta Office of Audits, part of HHS's Office of Inspector General, helps ferret out fraud, waste and abuse in the federal government. It is supervised by a Regional Inspector General of Audits ("RIGA"), and had approximately 98 employees in 2001. *Id.* The personnel are mostly auditors and audit clerks with various support people, including one or two program analysts positions.

Mr. Charles Curtis, at the US Department of Health and Human Services for 30 years as an auditor, was promoted to the position of the Regional Inspector General for Audits in the Atlanta office in 1995. *Id.* at 4. Mr. Curtis was the employee of Respondent responsible for making the selection of the successful candidate for all of the promotional decisions relevant here.

Although Mr. Curtis initially determined the personnel needs of his office, it was the human resource people in Washington, D.C. who decided what personnel needs could be filled, according to his deposition testimony. The paperwork for the filling of all of the approved positions, including those at issue here, was handled by a personnel office located in Washington, D.C. The program support center worked with Mr. Curtis to address whatever personnel issues arise for the office of audits.

In filling vacant positions, the D.C. support unit worked with Mr. Curtis' office to develop and then issue vacancy announcements, but only after the Atlanta office approved. The D.C. personnel office worked to insure that the vacancy announcement accurately described what the Atlanta Office of Audits sought in its job search. (Curtis Depo, p. 17). The program support center would then accept, evaluate and rank the candidates, Magistrate King's Report, p. 3, App. 14, for Mr. Curtis, who was the "selecting official" for all of the vacant positions relevant to Petitioner's claims.

For the promotion at issue, Mr. Curtis was given a list of candidates that was prepared prior to the D.C. personnel office's evaluation of their applications. (Curtis Depo, p. 20). Mr. Curtis described the support center's early list as a courtesy extended to his office "before these things [the applications] are even rated by them." He then described the opportunity provided by this list.

> If there was a candidate we liked on there we put a name select on there that this is a person that we're interested in. They rate it. **If it's a person that we had asked for** or that we thought was good, if the numbers come out, we have nothing

> to do with the numbers, **they will rank our request ahead of anybody else.**

(Curtis Depo, pp. 34-35) (emphasis added).

The specific promotion at issue in this action, a GS-9 program analyst position, identified as OIG-99-066, was announced with an opening date of April 7, 1999, and a closing date of April 20, 1999. Magistrate King's Report, p. 4, App. 15. The vacancy announcement indicated that candidates must file a timely application to be considered for the position. *Id.*

Appellee's Statement of Undisputed Facts set forth the language in the announcement for applying for the vacant position at issue here.

> To be considered for selection for the announced vacant position, applications must have been received by April 20, 1999, either by mail at the HHS Personnel Service Center, Personnel Operations Division, or by hand delivery at one of three personnel centers identified on the vacancy announcement.

Petitioner Thornton actually filed two separate applications for this position, using both approved methods of delivery. Magistrate's Report, p. 4, App. 15. On April 20, 1999, Petitioner mailed one copy of the application to HHS and had a second copy of her application hand delivered. Ms. Thornton faxed her application to a friend, Ms. Lisa Blake, an HHS employee stationed in Washington, D.C., for the express purpose of having it hand delivered to one of the approved personnel centers. *Id.*

Prior to the close of business on April 20, 1999, Ms. Blake did hand deliver Petitioner's application to HHS's

personnel center in Rockville, Maryland, one of the approved locations. *Id.* Thus, Petitioner Thornton did submit a timely application for promotion.

On or about April 29, 1999, Petitioner received a letter from Ms. Jean C. Trent, of HHS's Southwest Personnel Operations Division, informing her that her mailed application had been received after the closing date. The letter told Ms. Thornton that since her application had not been received in a timely manner, she would not be considered for the OIG-99-066 vacancy. *Id.* at 5.

Upon receipt of the letter, Petitioner called Ms. Trent and told her that a mistake had been made, explaining the circumstances of the hand delivered application. *Id.* "I called her and told her, yes, check with their front office, I had sent two copies, one I had faxed and one I had mailed." (Thornton Depo, pp. 50-51). Later, Petitioner stated that "Ms. Trent was not interested and gave no indication she would follow up." (Affidavit of Jeanell Thornton, ¶ 23).[1]

Petitioner also went to Mr. Curtis because Ms. Trent's letter informed her she would not be considered and yet she had submitted a timely application through her friend, Lisa Blake. Mr. Curtis recalled being told by Ms. Thornton that "they did not accept her application, or she got notice that it was mailed late or something." (Curtis Depo, p. 33) Magistrate's Report, p. 6, App. 16. He told her that he would "check into that." (Curtis Depo, p. 33). Ms. Thornton

[1] Magistrate Judge King actually stated that Petitioner had not requested an investigation. Magistrate's Report, p. 5, App. 15. This finding does not fit the facts, nor is it consistent with Petitioner making the call in the first place.

informed him of the problem sometime around the end of April, as best Mr. Curtis could recall. (Curtis Depo, p. 32). This was after the effort to hire another candidate, but was before the time that the job was offered to the applicant who was hired.[2]

Before Mr. Curtis selected a younger white male to fill the vacant position, Mr. Curtis had a conversation with Ms. Thornton regarding her submitting a timely application that was not included.[3]

Mr. Curtis testified that he called Washington, D.C. regarding Petitioner's information about a timely application, but that it was confirmed to him that Petitioner's application was late. In her findings, Magistrate King states that Mr. Curtis "confirmed that the personnel division received the application after the deadline." Magistrate's Report, p. 6, App. 16-17. There is no attempt by the Magistrate to reconcile her findings that the hand delivered application was timely and that only the late application was discussed by Respondent.

Mr. Curtis did not interview the applicants for the OIG 99-066 vacant position. (Curtis Depo, p. 40). He explained that he generally did not interview candidates

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[2] Inconsistently with Fed. R. Civ. P. 56, Magistrate King believed the movant regarding the date Mr. Curtis was told by Petitioner that her timely application was not processed, even though his testimony was not internally consistent. Ms. Thornton placed the conversation before the offer of employment was made to Mr. Durham.

[3] In the district court opinion, Judge Forrester states that Mr. Curtis did not learn of the timely application until after he selected another. Opinion, p. 3, App. 8. This however, is a contested fact, because Ms. Thornton says she did tell him before and the dates Mr. Curtis gives for the conversation about the missing timely application were before he made the selection. It is a contested material fact.

when his review of the applications provides him "a nice clear indication" of whom he should select. (Curtis Depo, p. 62).

Mr. Curtis filled the vacancy with another younger white applicant, Mr. Gerald Durham, Jr. (Curtis Depo, p. 37). Mr. Durham had no prior program analyst experience that appeared on his resume. (Curtis Depo, p. 39). Mr. Curtis was able to highlight his interest in Mr. Durham by telling a program support center employee, Joseph Rankin, of his interest in the younger Mr. Durham and then Rankin rated him. (Curtis Depo, p. 39). On the selection sheet, Mr. Durham was rated second. Mr. Curtis had to pick a veteran first and did. That candidate rejected the job by a letter dated April 30, 1999. Then Curtis picked Gerald Durham, Jr. and told Mr. Rankin to note it on the selection roster. (Curtis Depo, p. 45). That selection was made on May 4, 1999, according to Mr. Rankin's note on the selection sheet.

The vacancy announcement for OIG-99-066 had an opening date of April 7, 1999, but earlier a version had been sent for Mr. Curtis' approval. The application of Mr. Durham, who was selected, was signed and dated on Feb. 19, 1999, approximately six weeks prior to the initial posting of the official vacancy announcement. (Curtis Depo, p. 43). And his application had the vacancy announcement number on it. (Curtis Depo, p. 46). Mr. Durham's dated signature indicates he must have had the information about the vacancy announcement at least six weeks before it was even posted. Such information was in Mr. Curtis' possession. (Curtis Depo, p. 17). Neither Magistrate Judge King nor Judge Forrester addressed these facts.

During the course of Mr. Curtis' tenure as the Regional Inspector General for Audits, Petitioner spoke with him on several occasions about her interest in receiving a promotion. (Thornton Depo, pp. 29-30). Mr. Curtis recalled one such conversation, where he and Petitioner informally discussed her opportunities for advancement in that office although he could not place it in time.

Petitioner described one meeting she had with Mr. Curtis discussing why he did not select her for the 1996 program analyst position. He told Petitioner it was because of her lack of accounting skills. (Affidavit of Jeanell Thornton ¶ 9). Although accounting was not listed as a qualification on the vacancy announcement, Mr. Curtis told Ms. Thornton that he used it as a factor to reject Petitioner's application. *Id.*

Mr. Curtis explained his preference for accounting skills in discussing his selection for the position at issue here, OIG-99-066. He wanted to select a program analyst who he thought would get training and progress into the auditor job series, numbered as 511. Mr. Curtis then stated that "what we're looking for obviously is . . . that they would continue their education and pick up the requisite number of accounting courses so that they could convert over to a 511." (Curtis Depo, pp. 38-39).

Mr. Curtis acknowledged that it was his intention in filling vacant program analyst positions to develop that person into an auditor. "So basically we used this program analyst then as a way to try to attract somebody that we think eventually will move into the 511 series and bolster that or continue to feed the job requirements." (Curtis Depo, p. 57).

Mr. Curtis also recalled that he interviewed Petitioner and all of the other applicants for a 1996 vacancy, but he made no selection for that program analyst opening. Ms. Thornton applied for the position and was ranked by the personnel office in Washington, D.C. as one of the best-qualified applicants. (Thornton Depo, p. 29). In his deposition, Mr. Curtis was unable to recall the specific reason for the decision not to select someone for that vacancy, but he explained that his usual reason is that there are no candidates with whom he is satisfied. (Curtis Depo, p. 64).

The following year the position was announced again. Petitioner again applied and she was again deemed among the best qualified. (Thornton Depo, p. 29). This time, none of the applicants were interviewed and a white male, Gregory Peoples, who is much younger than Petitioner, was selected. When she learned that she had not been selected, Ms. Thornton went to Mr. Curtis to find out why. (Thornton Depo, p. 30). Petitioner testified that Mr. Curtis informed her that he wanted someone with an accounting background to fill the position. (Thornton Depo, p. 81). Ms. Thornton pointed out to him that the vacancy announcement had not indicated the need for accounting knowledge. (Thornton Depo, p. 81).

In 1998, another white applicant, Ms. Brenda Garza, was selected for promotion into a program analyst position. (Thornton Depo, p. 59). Ms. Thornton did not apply for the position, as she was unaware that any vacancy announcement had been issued. None had been posted that she knew about and no evidence regarding the posting of a vacancy announcement for this position appears in the Record. (Thornton Depo, pp. 64-68).

The promotion to a GS-12 program analyst position of Ms. Garza, who was already employed in the Office of Audits as a GS-11 Administrative Assistant, mandated the use of the Respondent's merit promotion process, which requires a vacancy announcement and a competitive process among applicants. Ms. Thornton, who believed the vacancy announcement had been hidden from her (Thornton Depo, pp. 64-68), would have been a viable candidate and may even have rated higher than Ms. Garza.[4]

When Ms. Garza was promoted to the program analyst GS-12 position, the agency hired a younger white woman to replace her as the administrative assistant. (Thornton Depo, p. 60). This position was filled at the GS-7 or GS-9 level, which would have been a promotion for Ms. Thornton. However, despite her expressed interest in promotional opportunities, Ms. Thornton did not apply for the position because she was not aware that any vacancy had been advertised. *Id.*

A list of applications received by Mr. Curtis for the promotion at issue here shows Ms. Thornton's mailed application was received beyond the April 20, 1999, deadline. (Thornton Depo, Exhibit 10, Certificate of Eligibles, DHHS/Program Support Center dated May 4, 1999). The list showed receipt of Petitioner's mailed application, but it did not address her hand-delivered copy. Respondent did not consider Ms. Thornton for the position and did not select her for the vacancy.

After unsuccessfully pursuing her rights through Respondent's internal complaint process, Petitioner filed

[4] The record does not reflect Ms. Garza's qualifications for that position.

suit in federal district court, using the jurisdictional provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5(f)(3) and of The Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §633a(c).

Magistrate Judge King submitted a Report and Recommendation. These findings of fact are found in Appendix at pages 12-40. The U.S. District Court, per Judge Forrester, submitted an opinion, Appendix, at pages 6-11, and he adopted the Magistrate's Report, in rendering a final judgment dismissing this action.

On appeal, in an unpublished decision, the Eleventh Circuit rejected Petitioner's arguments and affirmed the trial court's dismissal. Appendix, pages 1-5.

ARGUMENT

I STANDARD OF REVIEW

Summary judgment is only appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party . . ." *Id.* Material facts are those which may affect the outcome of a case and if disputed will preclude an entry of summary judgment. *Id.* at 248.

The evidence is to be viewed in the light most favorable to the nonmoving party and all reasonable inferences are to be drawn in her favor. *Bass v. Board of County*

Commissioners, 256 F.3d 1095, 1102 (11th Cir. 2001). The moving party bears the burden of persuasion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Further, on summary judgment the Court should avoid making credibility determinations nor should it weigh the evidence to reach its own conclusion. *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 150 (2000).

II APPELLANT ESTABLISHED A *PRIMA FACIE* CLAIM OF EMPLOYMENT DISCRIMINATION

An employment discrimination claim based on disparate treatment, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., should be analyzed under the burden-shifting format set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). There the Court established a triparte system for guiding lower courts in reviewing the merits of discrimination claims. The plaintiff is required to establish a *prima facie* case, then the employer must articulate a reasonable and legitimate explanation for its actions and finally, the plaintiff is provided an opportunity to prove that the employer's reasons are actually a pretext for unlawful discrimination. Although *McDonnell Douglas* was an analysis developed for Title VII of the Civil Rights Act of 1964, the same examination is appropriate for claims of age discrimination pursuant to the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et seq.* (2003). *Reeves v. Sanderson Plumbing Corp.*, 533 U.S. 133, 142 (2000); *Chapman v. A1 Transport*, 226 F.3d 1012 (11th Cir. 2000) (*en banc*).

Plaintiff carries the initial burden of establishing a *prima facie* case of racial discrimination. *McDonnell*

Douglas, 411 U.S. at 802. To prevail on a claim for discrimination under Title VII, a plaintiff must show that: (1) she is a member of a protected class; (2) she applied and was qualified for the position; (3) she was not selected for the position; and (4) someone outside her protected class was selected for the position at issue. *Id.*; *St Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993).

Here, there is no dispute that Petitioner Thornton is a member of a minority group and is over the age of 40.

Petitioner applied and was qualified for the vacant position. The facts supporting her valid application were recited by Magistrate Judge King. Significantly, Judge King noted that the hand delivered application for OIG-99-066 was timely received at the correct location. Magistrate's Report, p. 4, App. 14-15. The Report also recited language from Respondent's statement of undisputed facts: "To be considered for the vacancy, applications had to be received by HHS, Personnel Service Center, Personnel Operations Division, no later than the closing date of April 20, 1999." *Id.* Magistrate Judge King recited from the record that a timely application was hand delivered to Respondent's offices. *Id.* at 4-5.

After its delivery, nothing appears in the Record about the hand delivered application. Since there was no dispute that her hand delivered application was timely, Ms. Thornton did properly apply in such a manner as "to be considered for the vacancy."

There is no dispute as to the other two elements of the *prima facie* case. The Respondent did not consider Petitioner for the vacancy. She was not selected, but a younger, white male was.

The magistrate properly found that the Petitioner had established a *prima facie* case of discrimination. Magistrate's Report, p. 21, App. 29. Having completed the first step of the *McDonnell-Douglas* analysis, Magistrate King turned her focus to Respondent's evidence in rebuttal.

III RESPONDENT DID NOT PRODUCE ENOUGH EVIDENCE TO ARTICULATE A LEGITIMATE BUSINESS REASON FOR ITS FAILURE TO SELECT PETITIONER FOR PROMOTION

Magistrate King, citing to Defendant's submission for summary judgment, found that "[i]n this case, Defendant's reason for non-selection of Plaintiff for the position in April 1999 is that her application for the position was late being received after the closing date of April 20, 1999." Magistrate's Report, p. 23, App. 30. However, even though the judge had already determined that a timely application by Petitioner had been submitted, no attempt to reconcile these differences, or even to recognize them, was made by the court. Accepting this patently untrue assertion as an articulation of a legitimate reason was error.

In *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), the Court held that, once a plaintiff established a *prima facie* claim of employment discrimination, the burden of going forward with evidence shifts to the defendant. "[T]o satisfy this intermediate burden, the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." *Burdine*, 450 U.S. at 257. The employer must produce evidence of a legitimate explanation that is "clear and reasonably specific." *Id.* at 258. "The explanation provided must be legally sufficient to justify a judgment for the

defendant." *Id.* at 255. If such evidence is submitted by the defendant, the *prima facie* case is rebutted and "the factual inquiry proceeds to a new level of specificity." *Id.* "Placing this burden of production on the defendant thus serves . . . to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." *Id.* at 255-56.

Respondent, however, only came forth with a statement that is not valid and was knowingly inconsistent with the facts as found.

Petitioner argues that the standard applied by the Eleventh Circuit is too low.[5] Untrue statements are not legitimate reasons. Although not an onerous burden shouldered by the employer, the lower court erred in accepting a non-specific explanation that was not true for its failure to promote Ms. Thornton. And the lower courts knew of the falsity of the statement. Her factual showing accepted by the lower court demonstrated that Petitioner had complied with the requirements for submitting an application for promotion. Her application was not late. Further, when Petitioner learned that the application was not on the list submitted to the selecting official, she called the processing office. That call at the end of April 1999 was made before the selection ocurred. Petitioner submitted a timely application and notified the processing office

[5] The Eleventh Circuit opinion may simply be a misstatement of facts, except that the court recites its review of the record and the briefs before stating that "[b]ecause the Secretary established that Thornton was not considered for promotion because he had not received her application until after the job posting's closing date, the district court did not err by finding that the Secretary had proffered a legitimate, non-discriminatory reason for Thornton's non-selection."

of her submission, yet was not considered as a candidate. Respondent's statement that she was not considered because her application was late is false, as it was not late. A factual misstatement by an employer cannot be a legitimate reason for its actions.

Further, it should be incumbent upon the employer to provide an explanation for its failure to follow its own procedures. Respondent did not even attempt to make such a showing. *Burdine* only requires enough evidence to "allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus," *Burdine*, 450 U.S. at 257. This Court, in *Reeves*, held that a false statement or a false explanation may alone be a basis for a jury finding of discrimination. 530 U.S. at 147. Thus, the *Burdine* standard was not met.

Further, by not providing information as to the failure to process Petitioner's timely application, Respondent did not address the heart of the question raised by Ms. Thornton of why she was not promoted when she had applied and was qualified.

The reason provided by Respondent was not specific and it was not true. It did not focus the attention of the parties and the court on a critical dispute involved in Petitioner's claims. The employer did not address her hand delivered application. The requirement that an employer articulate a legitimate, reasonably specific explanation for the failure to consider Ms. Thornton's application was not met here and Respondent's proffer should not be considered a legitimate non-discriminatory reason.

IV THE COURT ERRED IN REQUIRING PETITIONER TO PROVIDE ADDITIONAL EVIDENCE WHEN THE EMPLOYER'S PROFFERED REASON INVOLVES ITS OWN PROCESS WHICH IT DID NOT FOLLOW AND WHICH IS TOTALLY UNDER ITS CONTROL

Assuming *arguendo* that the Court finds that the employer met its burden, then Petitioner argues that the lower court erred in not allowing a fact finder to assess the inferences created by the facts. The lower courts imposed too high a burden for Petitioner to meet.[6]

The analysis by the court became too narrow. When Petitioner offered information about the superiority of her qualifications compared to the selectee, it was rejected as not relevant. "Plaintiff's focus on the individual who was selected for the position is non-responsive to the pretext issue before the court. Plaintiff was not even considered for the position." Report, p. 25.

Finding that the application was timely filed, the court held that "[t]his evidence is not disputed." Report, p. 26. However, the court then misapplies the burden of production.

However, Plaintiff offers no evidence of what transpired with that application after its receipt in Rockville, Maryland. Additionally, Plaintiff does not attribute any discriminatory motive to the white female or anyone else in Rockville, Maryland.

Report, p. 26.

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[6] "Plaintiff was not able to provide any evidence that the personnel office's apparent failure to process the application that was hand delivered on the announcement's closing date was discriminatory." District Court opinion, p. 5, App. 10.

Two clear errors arise from this missing evidence. First, it was Respondent who had knowledge of the valid application as Petitioner had completed her obligation of submitting it on time. The failure to require a focused legitimate reason from Respondent as transformed into a failure by Petitioner to explain what occurred in the break-down of the employer's processing.

More significantly, the court required evidence of discriminatory animus.

The lower court also ignored the evidence that the decision maker had influence over the office where the timely application was filed and that the office had previously extended other courtesies to this same official regarding this same promotion process. Mr. Curtis asked for special treatment for the applicant he selected and accorded special treatment to him, as seen from the early dating of the application itself. But when Petitioner inquired about her application, there is no record that anything was done. By requiring that it was incumbent upon the Petitioner to uncover the details of the failure of the Respondent to process her valid application, the court imposed too heavy a burden on her.

It is for a fact-finder to decide if the missing application was a method used to avoid facing Ms. Thornton in the promotion process.

Further, and significantly, the lower court looked to the Petitioner to develop facts concerning the animus of the unknown processors in Rockville, Maryland, when evidence existed that the D.C. office worked closely with Mr. Curtis regarding this and other promotions. Weight should have been accorded to the connections drawn between the people involved in the processing.

Further, Petitioner had expressed her displeasure with the prior repeated failures to receive a promotion, despite her tenure and qualifications. Appellant notified both the selecting official and the personnel office of the problem with her missing application, and received no assistance, yet the person selected, a younger, white male, signed his application six weeks before the vacancy announcement was publicly posted. This could infer disparate treatment in the level of assistance provided to the two different applicants.

These three facts were before the lower courts, without consequence: 1. personnel had previously extended Mr. Curtis courtesies regarding the candidates of this particular promotion, 2. Mr. Curtis provided assistance to one applicant, a younger white, but not to Petitioner, and 3. There were no efforts by Mr. Curtis or others to find the valid application. These three could easily underpin a factual finding that Mr. Curtis was the person responsible for the disappearance of Ms. Thornton's application. He need not select her because she was not on the list rather than defending that he thought her less qualified.

The failure of Respondent's name to appear on the list of candidates when the facts show that she followed correct procedures, must raise questions to a fact finder. Even if it were just happenstance, the requests at that time by Petitioner Thornton to research the disappearance were met with no response. Knowing that the program support center person, Ms. Trent, would not look into the circumstances of the missing application and that Mr. Curtis, with 30 years of experience in an office trained to search for fraud, waste and abuse, did no more than a perfunctory telephone call, could easily convince an objective observer that the disappearance was more than

coincidence. A fact finder could see the excuse as unworthy of credence.

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000), the Court recognized that where a defendant's explanation for a particular employment practice is "unworthy of credence," there exists "one form of circumstantial evidence that is probative of intentional discrimination." There the fact finder had heard unbelievable explanations by management to justify its adverse actions against Mr. Reeves. The Court held that this evidence was enough to support a finding of discrimination against the employer.

The facts raised by Petitioner regarding her application for the position and the government agency's procedural breach, without explanation, should give rise to an inference of discrimination, without more. No discriminatory animus is required.

There is a split in the circuit courts on how to assess an employer's failure to follow procedure. Other circuit courts use a different standard than the Eleventh Circuit. At least two circuits have held that an employer's failure to follow its own procedures leads to an inference of discrimination. For example, in *Floyd v. Missouri Department of Social Services*, 188 F.3d 932, 937 (8th Cir. 1999), "the court recognized that departure from policies may support an inference of pretext". And, in *Norville v. Staten Island University Hospital*, 196 F.3d 89, 97 (2d Cir. 1999), the court held that the plaintiff established enough circumstantial evidence to give rise to an inference of discrimination: "In carrying this burden, it is enough for a plaintiff to present evidence that an employer departed

from its usual employment practices and procedures in dealing with that particular employee." *Id.* at 97.

> While we do not second-guess an employer's hiring standards, the reasons for its employment decision, including its alleged reliance on such standards, are subject to scrutiny under Title VII, and 'departures from procedural regularity,' for example, 'can raise a question as to the good faith of the process where the departure may reasonably affect the decision.'

Stern v. Trustees of Columbia Univ., 131 F.3d 305, 313 (2d Cir. 1997) (quoting *Zahorik v. Cornell University*, 729 F.2d 85, 93 (2d Cir. 1984)).

The different in standards used by courts to review an employee's efforts to prove discrimination has far reaching effects. Since proof of pretext is the key to allow claimants access to a jury trial before their peers, standards should be consistent. At this time, the Eleventh Circuit is not consistent with the Second Circuit and the Eighth Circuit.

The Supreme Court should resolve this conflict.

CONCLUSION

For all the foregoing reasons, the Court should grant Petitioner's petition for certiorari.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-14639
Non-Argument Calendar

D. C. Docket No. 01-02113-CV-JOF-1

JEANELL W. THORNTON,

Plaintiff-Appellant,

versus

TOMMY G. THOMPSON, Secretary
of Department of Health and
Human Services Agency,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(Filed April 19, 2004)

Before BIRCH, BARKETT and PRYOR, Circuit Judges.

PER CURIAM:

Jeanell W. Thornton appeals the district court's grant of summary judgment to Tommy G. Thompson, the Secretary of the Department of Health and Human Services (Secretary), in her lawsuit alleging violations of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

We review *de novo* a district court's order granting summary judgment, "applying the same legal standards as the district court." *Chapman v. AI Transp.*, 229 F.3d 1012, 1023 (11th Cir. 2000) (*en banc*). "Summary judgment is appropriate if the evidence before the court shows 'that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' In making this determination, the court must view all evidence and make all reasonable inferences in favor of the party opposing summary judgment." *Haves v. City of Miami*, 52 F.3d 918, 921 (11th Cir. 1995) (internal citation omitted).

Once a plaintiff establishes a *prima facie* case of discrimination in employment, the defendant has the burden to articulate a legitimate, non-discriminatory reason for the employment decision. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981). This burden is met if the defendant, through admissible evidence, "raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Id.*, at 254-55, 101 S.Ct. at 1094. If the defendant meets his burden of showing a legitimate, non-discriminatory reason for his employment decision, the plaintiff has the burden to introduce evidence sufficient enough so that a reasonable trier of fact could conclude that the proffered reason "was not the true reason for the employment decision." *Rice-Lamar v. City of Ft. Lauderdale, Fla.*, 232 F.3d 836, 8443 (11th Cir. 2000) (involving a Title VII claim).

To prevail on a claim of pretext, the plaintiff must show that the defendant's employment decisions were motivated by racial or age bias. *Alexander v. Fulton County, Ga.*, 207 F.3d 1303, 1339 (11th Cir. 2000). Evidence of pretext may

be shown, among other ways, through "direct evidence of discrimination in the form of statements and admissions or by circumstantial evidence in the form of comparative or statistical evidence." *Woody v. St. Clair County Com'n*, 885 F.2d 1557, 1560 (11th Cir. 1989).

The fact-finder is not to decide whether the challenged employment decision is "prudent or fair," but rather, is to determine whether the reason for the action was given merely to mask a discriminatory decision. *Rojas v. Florida*, 285 F.3d 1339, 1342 (11th Cir. 2002). Mere conclusory allegations of discrimination, without supporting evidence, cannot establish that the defendant's proffered, non-discriminatory reasons are pretextual. *Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 597 (11th Cir. 1987); *Raney v. Vinson Guard Service, Inc.*, 120 F.3d 1192, 1198 (11th Cir. 1997).

Upon review of the district court record and the briefs, we find no reversible error here. Because the Secretary established that Thornton was not considered for promotion because he had not received her application until after the job posting's closing date, the district court did not err by finding that the Secretary had proffered a legitimate, non-discriminatory reason for Thornton's non-selection. Moreover, because Thornton failed to establish pretext, the district court did not err by granting summary judgment to the Secretary.

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JEANELL W. THORNTON, Plaintiff, vs. TOMMY G. THOMPSON, Secretary of Department of Health and Human Services, Defendant.	:	CIVIL ACTION FILE NO. 1:01-cv-2113-JOF

JUDGMENT

This action having come before the court, Honorable J. Owen Forrester, United States District Judge, for consideration of the Report & Recommendation of the Magistrate Judge and defendant's motion for summary judgment, and the court having adopted the Report & Recommendation and granted said motion, it is

Ordered and Adjudged that the plaintiff take nothing; that the defendant recover its costs of this action, and the action be, and the same hereby, is **dismissed.**

Dated at Atlanta, Georgia, this 21st day of July, 2003.

LUTHER D. THOMAS
CLERK OF COURT

By: /s/ [Illegible]
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
July 23, 2003
Luther D. Thomas
Clerk of Court

By: /s/ [Illegible]
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JEANELL W. THORNTON, Plaintiff, vs. TOMMY G. THOMPSON, Secretary of Department of Health and Human Services, Defendant.	:	CIVIL ACTION NO. 1:01-CV-2113-JOF

ORDER

(Filed July 21, 2003)

This matter is before the court on Defendant's motion for summary judgment [20-1] and the Report and Recommendation of Magistrate Judge Janet F. King [31-1].

I. Background

A. Procedural History

Plaintiff, Jeanell W. Thornton, filed suit against Defendant, Tommy G. Thompson, on August 8, 2001, alleging that Defendant discriminated against her on the bases of her race and sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* Plaintiff also alleges that Defendant discriminated against her on the basis of her age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621, *et seq.* Defendant filed a motion for summary judgment on December 10, 2002. Magistrate Judge Janet F. King issued a Report and Recommendation in which

she recommends granting Defendant's motion for summary judgment. No party filed objections to the Report and Recommendation.

B. Facts

Plaintiff began working for the federal government in 1967. She was hired by the Department of Health and Human Services ("the Department"), Office of the Inspector General, in 1991 and was promoted to a GS-6 level several years later. Plaintiff's job included typing and distributing reports and acting as a time-keeper for 30-40 employees. During the relevant time period, her supervisor was Charles Curtis, a white male, the Regional Inspector General of Audit for the Atlanta office. Plaintiff is now retired.

Plaintiff applied for a GS-7 program analyst position in 1996. That position was withdrawn and re-announced in July 1997 as a GS-5 program analyst. Greg Peoples, a white male under the age of 40, was selected for the position. Although Plaintiff felt this decision was discriminatory, she did not file a complaint, but only spoke with an Equal Opportunity Employment officer about the situation. Another GS-7 program analyst position was announced and filed in 1998. Plaintiff never applied for this position because she was not aware it was announced. A white female was selected.

On April 7, 1999, the Department issued a vacancy announcement for a Program Analyst GS-9 position in Atlanta. The closing date for the announcement was April 20, 1999, and applications could be mailed or hand-delivered to three personnel centers. Plaintiff mailed her application on April 20, 1999, and faxed a copy to a friend,

Lisa Blake, employed by the Department in Maryland, so that Ms. Blake could hand-deliver the application to the Department's personnel center in Rockville, Maryland. Ms. Blake submitted Plaintiff's application to a white female at the personnel center and asked for a receipt, but the employee said no receipt was necessary because the application would be stamped as received. On April 29, 1999, Plaintiff received a letter from the personnel office indicating that her application would not be considered because it was received after the closing date of the vacancy announcement. Thirty other applications were also marked as filed late. A list of eligible candidates was sent to Mr. Curtis who selected Gerald Dunham, a white male under the age of 40, for the position. Mr. Curtis was not aware that Plaintiff had attempted to apply for the position until after Mr. Dunham had been selected.

Plaintiff met with an Equal Opportunity Employment counselor from the Department on July 28, 1999. On September 20, 1999, Plaintiff filed a formal complaint of discrimination and on January 13, 2000, the Department dismissed Plaintiff's complaint as untimely. The EEOC affirmed this decision on January 8, 2001.[1]

[1] Defendant did not address the issue of timeliness in his motion for summary judgment. The Magistrate Judge noted this omission and concluded that Defendant waived this defense. Because the court concludes that Defendant's motion for summary judgment should be granted on the merits of Plaintiff's claims, the court need not address whether Defendant waived his timeliness defense.

C. Contentions

Plaintiff contends that Defendant discriminated against her on the basis of her race, gender, and age in denying her promotions in 1997 and 1999, and in failing properly to advertise a job vacancy announcement in 1998. Plaintiff contends that the white men under the age of 40 who were selected for the positions were not qualified. Defendant responds that Plaintiff abandoned her claims of gender discrimination altogether and her claim of discrimination with respect to a 1998 denial of promotion to a program analyst position because she did not respond to Defendant's motion for summary judgment on these points. Defendant also argues that the court cannot consider Plaintiff's discrimination claim on the 1997 denial of promotion because she never filed a complaint with the Department's EEO office and her complaint now is untimely. Finally, Defendant asserts that Plaintiff was not considered for promotion in 1999 because her application was untimely.

II. Discussion

In her Report and Recommendation, Magistrate Judge King agreed that Plaintiff has abandoned her gender discrimination allegations altogether, as well as her claim of discrimination with respect to a 1998 denial of promotion to a program analyst position. With respect to Plaintiff's allegation on the 1999 failure to promote, the Magistrate Judge assumed *arguendo* that Plaintiff could establish a *prima facie* case of race and age discrimination. Defendant then proffered a legitimate non-discriminatory reason for his failure to select Plaintiff for the promotion because her application was late. Plaintiff claimed this

reason was pretextual because her application was hand-delivered on time, the individual selected for the job was not qualified, and Mr. Curtis had never selected a black female for a program analyst position. As the Magistrate Judge noted, however, Plaintiff was not even considered for the position, so the qualifications of the chosen candidate are not relevant to show whether Defendant's legitimate non-discriminatory reason is pretextual. Furthermore, Plaintiff was not able to provide any evidence that the personnel office's apparent failure to process the application that was hand-delivered on the announcement's closing date was discriminatory. Plaintiff, herself, testified that she did not believe the Maryland personnel office acted in a discriminatory manner. Plaintiff also failed to adduce any evidence that the decision maker, Mr. Curtis, was even aware of Plaintiff's interest in the position, let alone was involved in the determination of whether her application was timely. Finally, Plaintiff's contention that Mr. Curtis never selected a black female for a program analyst position is not sufficient to rebut Defendant's legitimate non-discriminatory reason for her not being considered because Mr. Curtis did not have anything to do with the decision to consider Plaintiff's application untimely.

The Magistrate Judge concluded that Plaintiff's complaint about her failure to receive the 1997 promotion was not a violation that "continued" with respect to the 1999 promotion. *See National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002) (failure to promote is a "discrete" act "easy to identify" as an unlawful employment practice and as such, the continuing violation doctrine does not apply). As such, the Magistrate Judge concluded that Plaintiff's complaint in 2001 about a promotion in 1997 was untimely.

In sum, Magistrate Judge King recommended granting Defendant's motion for summary judgment and dismissing Plaintiff's complaint with prejudice. No party filed objections to the Report and Recommendation. Having read and considered the parties' pleadings and the Report and Recommendation of the Magistrate Judge, the court ADOPTS the Report and Recommendation as the ORDER of this court. Defendant's motion for summary judgment is GRANTED.

III. Conclusion

The court GRANTS Defendant's motion for summary judgment [20-1] and ADOPTS the Report and Recommendation of Magistrate Judge Janet F. King [31-1]. The Clerk of the Court is DIRECTED to DISMISS WITH PREJUDICE Plaintiff's complaint.

SO ORDERED this 21st day of July 2003.

/s/ J. Owen Forrester
J. OWEN FORRESTER
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JEANELL W. THORNTON, Plaintiff, v. DONNA E. SHALALA, Secretary of Health and Human Services, Defendant.	CIVIL ACTION FILE NO. 1:01-CV-2113-JOF

FINAL REPORT AND RECOMMENDATION

(Filed Mar. 26, 2003)

Plaintiff Jeanell W. Thornton filed this employment discrimination action against Defendant Tommy Thompson, Secretary of Health and Human Services, on August 8, 2001. [Doc. 1]. Plaintiff contends that Defendant violated Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended 42 U.S.C. § 2000e, *et seq.*, by discriminating against her on the basis of her race, African-American, and gender, female. Plaintiff also alleges that Defendant discriminated against her on the basis of her age, in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.*[1] [*Id.*]

[1] Count One of the complaint alleges a violation of the ADEA. [Doc. 1 at ¶¶ 31-36]. Count Two alleges a violation of Title VII asserting racial discrimination. [Doc. 1 at ¶¶ 37-42]. Count Three alleges a continuing violation of Plaintiff's civil rights as previously set forth in the complaint. [Doc. 1 at ¶¶ 42-46]. There is no allegation of Title VII gender discrimination in the complaint. However, because the Plaintiff apparently believes she has asserted such as claim, and Defendant has

(Continued on following page)

Defendant has filed a motion [Doc. 20] for summary judgment on all of Plaintiff's claims pursuant to Rule 56(b) of the Federal Rules of Civil Procedure based upon the pleadings, statements of material facts, exhibits, and discovery materials submitted by the parties.

I. Statement of Facts

When evaluating the merits of a motion for summary judgment, the court must view the evidence and factual inferences in a light most favorable to the non-moving party. *See Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1529 (11th Cir. 1987). However, unsupported self-serving statements by the party opposing summary judgment are insufficient to avoid summary judgment. *See Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 714 (11th Cir. 1984). Therefore, the evidence presented by the parties having been evaluated in accordance with the foregoing principles, the following facts are deemed to be true for the limited purpose of evaluating Defendant's motion for summary judgment.

Plaintiff, an African-American female, who was born on November 23, 1944, began her full-time employment with the federal government in 1967 as a GS-3 with the Office of Economic Opportunity. She worked for that agency until it was abolished in 1981 having obtained the grade of GS-12. [Defendant's Statement of Material Fact ¶¶ 1-2; Plaintiff's Affidavit ¶ 2]. In 1983, Plaintiff returned to government service working for the United States Criminal Investigative Laboratory as a GS-5.

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not objected to inclusion of a gender discrimination claim, the court will address that allegation of discrimination herein.

[Defendant's Statement of Material Fact ¶ 3]. In 1991, Plaintiff was hired by the Department of Health and Human Services ("HHS"), Office of the Inspector General ("OIG"), Office of Audits as a GS-5 Audit Clerk and was promoted to a GS-6 a few years later.[2] [Defendant's Statement of Material Fact ¶¶ 4-5]. Plaintiff's duties included typing and distributing reports and acting as a timekeeper for approximately thirty (30) to forty (40) employees. [Defendant's Statement of Material Fact ¶ 6].

The Office of Audits is administered by a Regional Inspector General of Audit ("RIGA"), who supervises six (6) to seven (7) audit managers, who in turn supervise the senior auditors and the audit clerks. [Defendant's Statement of Material Fact ¶ 8]. During the relevant time period, Charles Curtis was the RIGA for the Atlanta office. [Curtis Deposition ("Dep.") at 4-5].

On April 7, 1999, a vacancy, OIG-99-066 for a Program Analyst, GS-343-9, Office of Audits, was announced. The closing date for the announcement was April 20, 1999.[3] [Defendant's Statement of Material Fact ¶ 10]. To be considered for the vacancy, applications had to be received by HHS, Personnel Service Center, Personnel Operations Division, no later than the closing date of April 20, 1999. The applications could be mailed to the Personnel Operations Division or hand delivered to one of the

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[2] Plaintiff retired from government service on October 1, 2000. [Defendant's Statement of Material Fact ¶ 9].

[3] All vacancy announcements, with the opening and closing dates, originate out of the Personnel Operations Division in HHS. This personnel office also handles advertising the vacancies, as well as receiving all applications and rating and ranking applicants. [Curtis Dep. at 14-17, 19, 21-23].

three personnel centers identified on the vacancy announcement. [Defendant's Statement of Material Fact ¶ 11]. Plaintiff mailed her application for the vacancy on April 20, 1999, and faxed a copy to Lisa Blake, a HHS auditor employed in the Rockville, Maryland, office, for the purpose of having Ms. Blake hand deliver the application to the personnel center at the Parklawn Building, 5600 Fishers Lane, Room 17-38, Rockville, Maryland 20857. [Defendant's Statement of Material Fact ¶ 12; Blake Affidavit ¶¶ 2-3]. Ms. Blake, prior to close of business on April 20, 1999, delivered the faxed application to the Rockville personnel office where a white female accepted the application. When Ms. Blake requested a receipt, the white female stated that a receipt was not necessary because she would stamp the application as received. [Blake Affidavit ¶ 4].

On or about April 29, 1999, Plaintiff received a letter from Jean. C. Trent, Southwest Personnel Operations Division, dated April 27, 1999, advising Plaintiff that HHS, Office of the Secretary, Program Support Center, Personnel Operations Division-Switzer (the location to which the applications were to be mailed) had received Plaintiff's application after the closing date. For this reason, Plaintiff's application would not be considered for the GS-9 Program Analyst position. [Defendant's Statement of Material Fact ¶ 14]. After receiving the letter, Plaintiff telephonically contacted Ms. Trent and advised Ms. Trent that, in addition to the mailed application, a copy had been hand delivered. [Plaintiff's Dep. at 83]. Plaintiff further advised Ms. Trent that they would be hearing from her because she would not let this drop; however, she did not ask Ms. Trent to investigate the hand delivery of the application. [*Id.*]. Plaintiff's application

was marked late when it was received at the Switzer Building Personnel Center. And, a roster of the applications received for this position indicates that Plaintiff's application was received on April 26, 1999. [Defendant's Statement of Material Fact ¶ 15].

A list of eligible candidates was prepared by the Personnel Operations Division which included five (5) applicants but not Plaintiff. [Doc. 20, Ex. 6]. The rating and ranking of all of the applicants for this vacancy took place in the personnel office in Washington without the involvement of Mr. Curtis or anyone else in the Office of Audits in Atlanta. [Curtis Dep. at 19-23, 44-45]. After reviewing the information for the listed eligible candidates, Mr. Curtis selected Gerald Dunham, Jr., a white, male, who was under the age of forty (40).[4] Mr. Dunham was offered and accepted the position. [Curtis Dep. at 37-45].

Mr. Curtis recalls that after the selection of Mr. Dunham and the announcement that the vacancy was filled, Plaintiff, who was upset, spoke to him about the fact she was not considered for the position. [Curtis Dep. at 31-32]. Mr. Curtis advised Plaintiff that her name was not on the list received from personnel, and Plaintiff advised that she had been told the application was late. [Curtis Dep. at 33]. This was the first time that Mr. Curtis was aware that Plaintiff had applied for the position. [Curtis Dep. at 31]. Mr. Curtis advised Plaintiff that he would check on the application. When he did, he confirmed that the

[4] Mr. Curtis selected Mr. Dunham because he had a BS degree in business and some accounting background and analysis experience. [Curtis Dep. at 37-39].

personnel operations division received the application after the deadline. [Curtis Dep. at 33].

Plaintiff testified that to her knowledge she had never met the white female who received the hand delivered application nor had she met Ms. Trent. Neither woman, as far as Plaintiff knew, was aware of Plaintiff's age, race or gender, except as might be indicated by her first name. [Plaintiff's Dep. at 51-54]. Plaintiff testified that she did not believe that either the white female or Ms. Trent discriminated against her. [Plaintiff's Dep. at 54-57]. She testified that the decision on her application came from "higher ups." She identified Mr. Curtis as the person who discriminated against her on this promotion denial.[5] [Plaintiff's Dep. at 57-58]. Plaintiff, however, testified that she had no knowledge of any contact between anyone in the Office of Audits and in the personnel office in Washington about her application. [Plaintiff's Dep. at 52-53]. Plaintiff testified as follows at her deposition:

> Q: Will you please explain to me how Mr. Curtis was involved in Ms. Trent's determination that your application was untimely?
>
> A: I don't know if whether she [sic] was involved with her or not. I don't even know if he talked with her. So I can't say that he was involved with her.

[Plaintiff's Dep. at 109]. Plaintiff further testified about this selection:

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[5] Plaintiff testified that Mr. Curtis never made any discriminatory statements as to race, sex or age. [Plaintiff's Dep. at 105-106].

> Q: Now in the case in which Mr. Dunham was selected you were never even considered; isn't that correct?
>
> A: Yes, that's correct.
>
> Q: Okay. And you were never considered means that Mr. Curtis never had your name or your application packet to look at; isn't that correct?
>
> A: That's correct.
>
> Q: And so Mr. Curtis did not even know you were interested in that position and had filed an application, did he?
>
> A: Not until I went to him and asked him about it.
>
> Q: All right.
>
> A: But he knew I was interested in a PA position, because I had gone to him several times too.

[*Id.*]

Prior to applying for the GS-9 program analyst position in April 1999, Plaintiff had applied for and not been selected for various other positions in the OIG Office of Audits. [Defendant's Statement of Material Fact ¶ 18]. Plaintiff applied for a GS-7 program analyst position announced in 1996. That position was withdrawn and re-announced in July 1997 as a GS-5 program analyst. A white male, under the age of forty (40), Greg Peoples, was selected for that position. Plaintiff felt that her non-selection for this position was discriminatory; however, she did not file a complaint concerning this selection. [Defendant's Statement of Material Fact ¶ 19; Plaintiff's Dep. at 41-42]. She spoke to Simpson Clark about her

non-selection for the position to make Mr. Clark aware of her concerns.[6] [Plaintiff's Dep. at 79-81].

Another GS-7 program analyst position was announced and filled in 1998.[7] A white female, who was an administrative assistant in the Office of Audits, was selected for this position. [Defendant's Statement of Material Fact ¶ 20]. Plaintiff did not apply for this position because she claims she was not aware that it was announced. She believed that the selection was discriminatory, and even though she was aware that she could file a complaint, she did not do so. [Plaintiff's Dep. at 75-79]. Although she cannot recall specific dates, Plaintiff spoke to Mr. Clark on several occasions about her ongoing concerns that she was being discriminated against. [Defendant's Statement of Material Fact ¶ 23].

Mr. Clark recalled and noted on his calendar that he spoke to Plaintiff on February 3, 1999, about a concern regarding her non-selection for a position. Mr. Clark was often contacted as an EEO officer by employees for referral to EEO counselors. [Clark Dep. at 11-12; Doc. 20, Ex. 8]. On this date, Mr. Clark recalls discussing with Plaintiff

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[6] Mr. Clark was an HHS employee who worked in the Administration for Children and Families and who was an Equal Employment Opportunity ("EEO") officer but not a counselor. [Clark Dep. at 4-5, 9]. Plaintiff was referred to Mr. Clark by HHS Regional Director's secretary and other administrative employees [Defendant's Statement of Material Fact ¶¶ 23-24].

[7] It is not clear from the record if Plaintiff is referring to the GS-7 Program Analyst vacancy in 1998 or to the 1998 change in position of the Office of Audits' Administrative Officer from a GS-11 to a GS-12 Program Analyst. [Plaintiff's Dep. at 59-74]. Clarification of the nature of the vacancy is not material to resolution of the motion for summary judgment.

her concerns and advising her of the process for filing an EEO complaint, including the time deadlines. Because there were no counselors available in his agency, he recalls contacting Ms. Sue Porter Anderson, the Director at the Centers for Disease Control ("CDC"), to determine if a counsel or would be available if Plaintiff decided to file a complaint. He determined that a counselor would be available. [Clark Dep. at 15, 17-20, 27-29, 33]. Mr. Clark advised Plaintiff that a request for EEO counseling must be in writing. [Clark Dep. at 51-52]. Mr. Clark did not recall the specific dates of other meetings with Plaintiff, and he did not document any further meetings. He did not recall Plaintiff requesting that a counselor be assigned prior to receiving a letter dated July 1, 1999, from her. [Clark Dep. at 20-21, 31-32; Doc. 2, Ex. 9].

Plaintiff's recollection differs regarding her meeting with Mr. Clark in February 1999. She spoke to him about an Administrative Assistant, who was a GS-11, being changed to a GS-12 program analyst and expressed her concerns about "all the wrongs" in the Office of Audit. [Plaintiff's Affidavit ¶ 16]. According to Plaintiff, it was not until Plaintiff met with Mr. Clark, after finding out that her application for the GS-9 Program Analyst position would not be considered in late April, that there was any discussion of identifying an EEO counselor. [Plaintiff's Dep. at 84-85, 88-89; Plaintiff's Affidavit ¶ 24]. Mr. Clark advised that he would locate a counselor for her to investigate her claims. [Plaintiff's Dep. at 84-85, 88-89]. After Plaintiff learned that Mr. Dunham was selected for the program analyst position, she met with Mr. Clark again and then he identified Moses Brewington as her counselor. [Plaintiff's Dep. at 85, 89; Plaintiff's Affidavit ¶¶ 25-28]. Plaintiff testified that she wrote the July 1, 1999 letter

requesting that a counselor be appointed to document her conversations with Mr. Clark. [Plaintiff's Dep. at 92].

Plaintiff was referred to Moses Brewington, EEO counselor with the CDC, to discuss her claims of discrimination. [Defendant's Statement of Material Fact ¶ 36]. Plaintiff met with Mr. Brewington on July 28, 1999. [Defendant's Statement of Material Fact ¶ 37; Plaintiff's Dep. at 86, 96]. Plaintiff's complaint was not informally resolved. [Defendant's Statement of Material Fact ¶ 38]. On September 20, 1999, Plaintiff filed a formal complaint of discrimination, and a decision was issued on January 13, 2000, dismissing Plaintiff's complaint as untimely pursuant to 29 C.F.R. § 1614.105(a)(1). [Defendant's Statement of Material Fact ¶¶ 42, 45]. On January 8, 2001, the Equal Employment Opportunity Commission ("EEOC") affirmed the agency decision and denied Plaintiff's motion to reconsider on February 22, 2001. [Defendant's Statement of Material Fact ¶¶ 46, 48]. Plaintiff filed her civil complaint in this court on August 8, 2001. [Doc. 1].

II. Summary Judgment Standard

The court should grant a motion for summary judgment where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56. The movant carries his burden by showing the court that there is "an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986). "Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact

that precludes summary judgment." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). The nonmovant is then required "to go beyond the pleadings" and present competent evidence in the form of affidavits, depositions, admissions and the like, designating "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324, 106 S. Ct. at 2553. Generally, "[t]he mere existence of a scintilla of evidence" supporting the nonmovant's case is insufficient to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202 (1986). Resolving all doubts in favor of the nonmoving party, the court must determine "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Id.*

"In an employment discrimination case, the plaintiff must produce sufficient evidence to support an inference that the defendant-employer based its employment decision on an illegal criterion." *Benson v. Tocco, Inc.*, 113 F.3d 1203, 1207 (11th Cir. 1997). Summary judgment in favor of the defendant-employer is proper unless the plaintiff puts forth sufficient evidence to allow a fact finder to disbelieve each of employer's proffered explanations for its actions. *See id.* (citing *Combs v. Plantation Patterns*, 106 F.3d 1519, 1532 (11th Cir. 1997), *cert. denied*, 522 U.S. 1045, 118 S. Ct. 685, 139 L. Ed. 2d 632 (1998)). Rejecting the holding in prior cases that summary judgment is inappropriate in employment discrimination cases, the Eleventh Circuit Court of Appeals, sitting *en banc*, recently stated that "[t]he long and short of it is that the summary judgment rule applies in job discrimination cases just as in other cases. No thumb is to be placed on

either side of the scale." *Chapman v. AI Transport*, 229 F.3d 1012, 1026 (11th Cir. 2000).

III. Discussion

a. Preliminary Issues

Defendant moves for summary judgment on the grounds that Plaintiff has failed to establish a *prima facie* case of age, gender or race discrimination. [Doc. 20].[8] Defendant further contends that, if the court finds that Plaintiff's evidence establishes a *prima facie* case of age, gender and race discrimination, there is a non-discriminatory reason for the denial of the 1999 promotion and that Plaintiff cannot establish a discriminatory motive or pretext. [*Id.*]. Defendant also moves for summary judgment on the basis that any discrimination claims on the prior denials of promotions in 1997 and 1998 are not timely and that these acts do not constitute continuing violations; therefore, Plaintiff cannot recover for these allegedly discriminatory acts. [*Id.*]. However, Defendant did not move for summary judgment on the ground that Plaintiff failed to initiate contact with the EEO counselor in a timely fashion. While Defendant sets forth facts on this issue in both the statement of facts in its brief and in the statement of material facts, there is no legal argument

[8] The court is not able to reference specific pages in Defendant's brief in support of the motion for summary judgment (or its reply to Plaintiff's response) because, contrary to local rule requirements, the Government failed to number the pages of its pleadings. *See* Local Rule 5.1D, N.D. Ga.

made or authority cited seeking summary judgment on this ground.[9] [*Id.*]

A federal employee must exhaust all of his administrative remedies before litigating Title VII discrimination claims in federal court. *See Wade v. Secretary of the Army*, 796 F.2d 1369, 1373 (11th Cir. 1986). This requirement includes 29 C.F.R. § 1614.105(a)(1), which states that federal employees "who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age or handicap . . . *must initiate contact with [an EEO] Counselor within 45 days* of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." 29 C.F.R. § 1614.105(a)(1) (emphasis added); *see also Foxx v. Dalton*, 46 F. Supp. 2d 1268, 1274 (M.D. Fla. 1999). This being said, the court finds that failure by Defendant to raise this issue constitutes a waiver of this timeliness claim as a defense in this case.

Although the case law on this issue is not clear, it appears that filing a timely formal complaint with a federal agency is not a jurisdictional prerequisite but a condition precedent to suit which is subject to waiver. *See Zipes v. Trans World Airlines*, 455 U.S. 385, 393, 102 S. Ct. 1127, 1132, 71 L. Ed. 2d 234 (1982) (holding that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling"). Most

[9] Plaintiff's brief in response to the motion for summary judgment acknowledges Defendant's failure to raise this ground in support of the motion for summary judgment. [Doc. 25 at 7].

courts that have addressed the issue have determined that a failure to exhaust administrative remedies is a precondition to suit rather than a jurisdictional requirement. *See, e.g., Vinieratos v. United States, Dep't of Air Force*, 939 F.2d 762, 768 n. 5 (9th Cir. 1991) ("We do not recognize administrative exhaustion under Title VII as a jurisdictional requirement per se; we treat it as a legal question under the de novo standard because the issue is whether the plaintiff has satisfied a statutory precondition to suit."); *Waiters v. Parsons*, 729 F.2d 233, 236-38 (3d Cir. 1984); *Fouce v. Jekyll Island-State Park Authority*, 713 F.2d 1518, 1525 (11th Cir. 1983) (holding that "all Title VII procedural requirements to suit are henceforth to be viewed as conditions precedent to suit rather than as jurisdictional requirements"). The reasoning behind many of these decisions is that to hold administrative requirements to be jurisdictional prerequisites would be inconsistent with Supreme Court decisions which have held that relief under Title VII may be awarded to plaintiffs who "have not exhausted administrative remedies before the EEOC. . . ." *Jackson v. Seaboard Coast Line Railroad Co.*, 678 F.2d 992, 1006 (11th Cir. 1982) (citing *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 95 S. Ct. 2362, 45 L. Ed. 280 (1975); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 96 S. Ct. 1251, 47 L. Ed. 2d 444 (1976)); *but see Sampson v. Civiletti*, 632 F.2d 860, 862 (10th Cir. 1980) ("[B]efore an applicant can properly invoke the jurisdiction of a court under this statute he must exhaust his administrative remedies. Exhaustion is a jurisdictional prerequisite to suit under 42 U.S.C. § 2000e-16.").

Because timely referral to an EEO counselor is simply a condition precedent for bringing suit, a defense for failing

to do so in a timely manner can be waived. Defendant waived that defense in this case. For these reasons, the court will not address the issue of whether Plaintiff sought and received EEO counseling in a timely fashion.

As noted, Defendant did move for summary judgment on Plaintiff's claims of gender discrimination and on the 1998 denial of promotion to a program analyst position. [Doc. 20]. Plaintiff did not respond to Defendant's motion on either of these issues. [Doc. 25]. The court finds that Plaintiff has abandoned those claims upon which Defendant sought summary judgment but which she did not oppose in her response to the summary judgment motion. *See Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1325-26 (11th Cir. 2000) ("The appellants' failure to brief and argue this issue during the proceedings before the district court is grounds for finding the the issue has been abandoned."); *Road Sprinkler Fitters Local Union No. 669 v. Independent Sprinkler Corp*, 10 F.3d 1563, 1568 (11th Cir. 1994) (plaintiff's failure to either move for summary judgment on claim raised in complaint or to respond to defendant's summary judgment motion on same claim, allowed district court to properly treat claim as abandoned); *accord Federal Savings and Loan Insurance Corporation v. Haralson*, 813 F.2d 370, 373 (11th Cir. 1987) (issues not properly briefed and argued before the court will be treated as abandoned).

For this reason, the court **RECOMMENDS** that Defendant's motion [Doc. 20] for summary judgment be **GRANTED** on Plaintiff's claims of sex/gender discrimination and on Plaintiff's claim of discrimination involving a denial of promotion in 1998 to a program analyst position. The issues remaining before the court involve Plaintiff's

age and race claims for the 1997 denial of promotion, for which Plaintiff seeks to recover based on application of the continuing violation doctrine, and for the 1999 denial of promotion.

b. 1999 Denial of Promotion

Plaintiff asserts that Defendant discriminated against her, based on her age and race, when it failed to consider her for the GS-9 Program Analyst position posted in April 1999. [Doc. 1 at ¶¶ 31-41]. For individual disparate treatment claims, the plaintiff carries the burden of proof of demonstrating that the defendant has unlawfully discriminated against her.[10] *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). In a circumstantial evidence case, such as that herein, the allocation of burdens and order of presentation of proof are as follows: (1) plaintiff has the burden of proving a *prima facie* case of discrimination by a preponderance of the evidence; (2) if the plaintiff proves the *prima facie* case, the court will presume discriminatory intent, and the burden (of production) then shifts to the

[10] To establish such a claim, the Plaintiff carries the additional burden of showing that "sufficient evidence exists, either direct or circumstantial, to infer a nexus or causal connection between race [or age] and disparate treatment." *Perkins v. U.S. Airways, Inc.*, 8 F. Supp. 2d 1343, 1352 (M.D. Fla. 1998) (quoting *Armstead v. City of Petersburg*, 1997 WL 724420 *2 (M.D. Fla. Nov. 13, 1997)). As the Supreme Court stated in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S. Ct. 1701, 1706, 123 L. Ed. 2d 338 (1993), "[i]n a disparate treatment case, liability depends on whether the protected trait actually motivated the employer's decision. . . . Whatever the employer's decision making process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome."

defendant to articulate a legitimate, non-discriminatory reason for the action taken against the employee; and (3) if the defendant carries this burden, the presumption of discrimination is eliminated, and plaintiff has an opportunity to prove by a preponderance of the evidence that the legitimate reason offered by the defendant was a pretext for discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804, 93 S. Ct. 1817, 1824-25, 36 L. Ed. 2d 668 (1973); *Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 642-643 (11th Cir. 1998).

When one of the complained of adverse employment actions is failure to promote, as in the present case, a plaintiff establishes a *prima facie* case of race discrimination[11] by showing (1) that she belongs to a protected group; (2) that she sought and was qualified for the position that the employer was attempting to fill; (3) that despite her qualifications she was rejected; and (4) that after her rejection the employer either continued to attempt to fill the position or in fact filled the position with a person outside of the plaintiff's protected group.[12] *See Walker v.*

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[11] Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

[12] Since *Perrymen v. Johnson Prods. Co.*, 698 F.2d 1138 (11th Cir. 1983), many Eleventh Circuit opinions have articulated the additional requirement that the plaintiff show that the person who filled the position was equally or less qualified than the plaintiff. *See, e.g., Carter*, 132 F.3d at 642; *Combs*, 106 F.3d at 1539 n. 11; *Roberts v. Gadsden Memorial Hosp.*, 835 F.2d 793, 796 (11th Cir.), *modified upon reconsideration*, 850 F.2d 1549 (11th Cir. 1988). Recently however, in *Walker*, 158 F.3d 1177, the Eleventh Circuit clarified that the plaintiff is not required to prove "relative qualifications" at the *prima facie* stage. The burden to present evidence of relative qualifications is placed on the

(Continued on following page)

Mortham, 158 F.3d 1177 (11th Cir. 1998); *Crawford v. Western Electric Co., Inc.*, 614 F.2d 1300, 1315 (5th Cir. 1980).

To establish a *prima facie* case of age discrimination,[13] a plaintiff-employee must demonstrate (1) that she was in the age group protected by the ADEA, (2) that she was adversely affected by an employment decision, (3) that the individual selected for the position was substantially younger than she was, and (4) that she was qualified for the position. *See O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 313, 116 S. Ct. 1307, 1310, 134 L. Ed. 2d 433 (1996); *Damon v. Fleming Supermarkets of Florida*, 196 F.3d 1354, 1359 (11th Cir. 1999); *Wisdom v. M.A. Hanna Co.*, 978 F. Supp. 1471, 1476-77 (N.D. Ga. 1997).

Defendant initially argues that Plaintiff cannot establish a *prima facie* case of either age or race discrimination because Plaintiff was not qualified for the position being sought. [Doc. 20]. The court will not address Plaintiff's qualifications at the *prima facie* case stage of the proceedings and for purposes of resolution of the motion for summary judgment will assume that Plaintiff established a *prima facie* case of both age and race discrimination with respect to the promotion denial in April 1999.

Once Plaintiff has established a *prima facie* case, the burden of production then shifts to Defendant to articulate

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employer, not the employee, in the rebuttal stage of the *McDonnell Douglas* framework. *See Walker*, 158 F.3d at 1192.

[13] The ADEA provides in pertinent part: "It shall be unlawful for an employer – (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age. . . ." 29 U.S.C. § 623(a)(1).

some legitimate, non-discriminatory reason for the action taken against Plaintiff. *See Combs*, 106 F. 3d at 1528 (citing *McDonnell Douglas*, 411 U.S. at 802, 93 S. Ct. at 1824; *Burdine*, 450 U.S. at 254 101 S. Ct. at 1094). To satisfy its burden of production, "the defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Id.* (quoting *Burdine*, 450 U.S. at 254-55, 101 S. Ct. at 1094). "[T]o satisfy this intermediate burden, the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." *Id.* (quoting *Burdine*, 450 U.S. at 257, 101 S. Ct. at 1096). The defendant's burden in the rebuttal stage is "exceedingly light." *Walker v. NationsBank of Florida*, 53 F.3d 1548, 1556 (11th Cir. 1995); *Perrymen*, 698 F.2d at 1142.

In this case, Defendant's reason for non-selection of Plaintiff for the position in April 1999 is that her application for the position was late being received after the closing date of April 20, 1999. [Defendant's Statement of Material Fact ¶¶ 14, 15]. For this reason, her application was not considered for the position. [Doc. 20, Ex. 6]. Plaintiff acknowledges that this as the reason stated to her for not considering her application. [Plaintiff's Dep. at 83, 109; Doc. 20, Ex. 3]. Defendant has met its burden.

Once a defendant meets its burden of production, "the presumption of discrimination created by the McDonnell Douglas framework 'drops from the case,' and 'the factual inquiry proceeds to a new level of specificity.'" *Combs*, 106 F.3d at 1528 (quoting *Burdine*, 450 U.S. at 255 & n. 10, 101 S. Ct. at 1094-95 & n. 10). The plaintiff then "has the

opportunity to demonstrate that the defendant's articulated reason for the adverse employment action is a mere pretext for discrimination." *Holifield v. Reno*, 115 F.3d 1555, 1565 (11th Cir. 1997) (citing *McDonnell Douglas*, 411 U.S. at 804, 93 S. Ct. at 1825). Plaintiff's proof of pretext merges with her "ultimate burden of showing that the defendant intentionally discriminated against the plaintiff." *Id.* (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511, 113 S. Ct. 2742, 2749, 125 L. Ed. 2d 407 (1993)). This task is a highly focused one.

The court "must, in view of all the evidence, determine whether the plaintiff has cast sufficient doubt on the defendant's proffered nondiscriminatory reasons to permit a reasonable fact finder to conclude that the employer's proffered 'legitimate reasons were not what actually motivated its conduct.'" *Combs*, 106 F.3d at 1538 (quoting *Cooper-Houston v. Southern Ry. Co.*, 37 F.3d 603, 605 (11th Cir. 1994)). The court's task is to "evaluate whether the plaintiff has demonstrated 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could find them unworthy of credence.'" *Id.* (quoting *Sheridan v. E.I. DuPont De Nemours & Co.*, 100 F.3d 1061, 1072 (3rd Cir. 1996) (en banc), *cert. denied*, 521 U.S. 1129, 117 S. Ct. 2532, 138 L. Ed. 2d 1031 (1997)). "[A] plaintiff may not in all cases merely rest on the laurels of her *prima facie* case in the face of powerful justification evidence offered by the defendant." *Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 596 (11th Cir. 1987). Plaintiff can either directly persuade the court that a discriminatory reason more likely motivated the employer or show indirectly that the employer's

proffered explanation is unworthy of credence. *See Miles v. M.N.C. Corp.*, 750 F.2d 867, 870-71 n.4 (11th Cir. 1985).

Plaintiff argues that the assertion that her application was not timely is a pretext for discrimination because her application was hand delivered on time and because the individual selected for the position was not qualified and was preselected for the position. [Doc. 25 at 6-7, 12-14]. Plaintiff appears to also argue that pretext is shown because Mr. Curtis never selected a black female for a program analyst position. [Doc 25 at 7-10]. The court is not persuaded by Plaintiff's arguments.

First, only her arguments regarding the timeliness of her application address the non-discriminatory reason given by Defendant for her non-selection. This is not a case where Plaintiff's qualifications as compared to those of the selectee, Mr. Dunham, are even relevant. Plaintiff's focus on the individual who was selected for the position is non-responsive to the pretext issue before the court. Plaintiff was not even considered for the position. [Defendant's Statement of Material Fact ¶ 14; Doc. 3]. If any discriminatory decision was made in this case impacting Plaintiff's application for the GS-9 position, it had to occur in the decision that her application was not timely and that she would not even be considered for the position.

With respect to the timeliness of her application, Plaintiff's evidence establishes that she mailed the application on April 20, 1999, recognizing that it would not be received by the closing date. [Defendant's Statement of Material Fact ¶ 12; Plaintiff's Dep. at 44]. For this reason, according to Plaintiff, she faxed a copy of the application to a friend, Lisa Blake, in Rockville, Maryland, who hand carried the application to one of the locations authorized

on the vacancy announcement. Ms. Blake states that she delivered the application before close of business on April 20 to a white female who did not provide a receipt but who stated she would stamp the application as received. [Plaintiff's Dep. at 45; Blake Affidavit ¶¶ 2-4]. This evidence is not disputed. However, Plaintiff offers no evidence of what transpired with that application after its receipt in Rockville, Maryland. Additionally, Plaintiff does not attribute any discriminatory motive to the white female or anyone else in the Rockville, Maryland, office. [Plaintiff's Dep. at 51-55].

The undisputed evidence also establishes that the Personnel Operations Division's only record of an application from Plaintiff was the copy of the application Plaintiff mailed on April 20, 1999, and received on April 26, 1999. [Defendant's Statement of Material Fact ¶¶ 14, 15]. The next day, Ms. Trent advised Plaintiff in writing that her application was late and would not be considered. [Doc. 30, Ex. 3]. There is no evidence that Plaintiff's hand delivered application was intentionally mislaid or that anyone in the personnel office intended to discriminate against Plaintiff in handling her application. Plaintiff, in fact, does not attribute any discriminatory motive with respect to Ms. Trent's handling of this matter. [Plaintiff's Dep. at 51-57]. Plaintiff's evidence does not establish pretext. Accepting that Plaintiff timely delivered a copy of the application which was lost, misplaced, or otherwise not documented does not establish evidence of pretext.

The issue is whether the employer actually believed that the application was not timely received at the time the decision was made not to consider Plaintiff for the program analyst position. "Federal courts 'do not sit as a super-personnel department that reexamines an entity's

business decisions. No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, the [law] does not interfere.'" *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991) (quoting *Mechnig v. Sears, Roebuck & Co.*, 864 F.2d 1359, 1365 (7th Cir. 1988)). As long as the decision-makers for Defendant honestly believed that Plaintiff had failed to timely submit her application and that this belief was the reason for her non-selection, even if the decision-makers were mistaken in their belief, pretext is not established. *See Smith v. Papp Clinic, P.A.*, 808 F.2d 1449, 1452-53 (11th Cir. 1987). There is no evidence to refute Defendant's stated reason for Plaintiff's non-selection.

As noted, Plaintiff claims that Mr. Curtis was the individual who discriminated against her in this selection process. [Plaintiff's Dep. at 52-53]. She points to the fact that he had never selected a black female for a program analyst position as evidence that a discriminatory motive led to her non-selection. [Doc. 25 at 10-12]. The problem with this pretext argument is that there is no evidence that Mr. Curtis had any involvement at all in the decision that Plaintiff's application was untimely and that she would not be considered for the vacancy. His motives regarding Plaintiff's application are totally immaterial to resolution of Plaintiff's discrimination claims. Plaintiff concedes that she has no knowledge of any contact between anyone in the Office of Audits and in the personnel office in Washington about her application. [Plaintiff's Dep. at 52-53]. Plaintiff testified as follows at her deposition:

> Q: Will you please explain to me how Mr. Curtis was involved in Ms. Trent's determination that your application was untimely?
>
> A: I don't know if whether she [sic] was involved with her or not. I don't even know if he talked with her. So I can't say that he was involved with her.

[Plaintiff's Dep. at 109]. Plaintiff further testified about this selection:

> Q: Now in the case in which Mr. Dunham was selected you were never even considered; isn't that correct?
>
> A: Yes, that's correct.
>
> Q: Okay. And you were never considered means that Mr. Curtis never had your name or your application packet to look at; isn't that correct?
>
> A: That's correct.
>
> A: And so Mr. Curtis did not even know you were interested in that position and had filed an application, did he?
>
> A: Not until I went to him and asked him about it.
>
> Q: All right.
>
> A: But he knew I was interested in a PA position, because I had gone to him several times too.

[*Id.*] The fact that Mr. Curtis may have been aware of Plaintiff's interest in a program analyst position does not change that fact that he was not even presented with an opportunity to consider Plaintiff for this position.

Plaintiff simply cannot prove that a protected trait, either age or race, "actually played a role in [the application] process and had a determinative influence on the outcome." *Biggins*, 507 U.S. at 1610, 113 S. Ct. at 1706. For these reasons, the court **RECOMMENDS** that Defendant's motion [Doc. 20] for summary judgment be **GRANTED** on Plaintiff's age and race claims with respect to the 1999 GS-9 Program Analyst vacancy.

c. 1997 Denial of Promotion

Plaintiff's final claim of discrimination focuses on the failure to promote her to a GS-5 Program Analyst position in 1997. [Doc. 1 at ¶¶ 42-46]. Defendant contends, and Plaintiff does not dispute, that this adverse employment action is not timely because Plaintiff did not seek EEO counseling or otherwise act to protect her rights within the requisite time frames. [Docs. 20 and 25 at 14-15]. However, Plaintiff asserts that the continuing violation doctrine applies to her case and that she can recover for this otherwise untimely denial of promotion. [Doc. 25 at 14-15].

The continuing violation doctrine allows a plaintiff who files a timely claim for a discriminatory act to recover for prior discriminatory acts which would otherwise be time-barred. *See Roberts*, 835 F.2d at 800. "Under the continuing violation doctrine, '[w]here an employee charges an employer with continuously maintaining an illegal employment practice, he [or she] may file a valid charge of discrimination based upon that illegal practice until 180 days after the last occurrence of an instance of that practice.'" *Blalock v. Dale County Board of Education*, 84 F. Supp. 2d 1291, 1306 (M.D. Ala. 1999) (quoting *Beavers v. American Cast Iron Pipe Co.*, 975 F.2d 792, 796

(11th Cir. 1992)). Accordingly, if an employer has continuously maintained an illegal employment policy or has committed a series of acts amounting to a practice of discrimination, the employer cannot rely on the statute of limitations to bar suit so long as at least one discriminatory act occurred within the required time period. *See Lewis v. Board of Trustees of Alabama State University*, 874 F. Supp. 1299, 1303 (M.D. Ala. 1995). However, the allegedly timely discriminatory actions or policy implementation "'cannot simply be a perpetuation of the effects of the past discriminatory acts.'" *Blalock*, 84 F. Supp. 2d at 1306 (quoting *Bush v. Liberty Nat'l Life Ins. Co.*, 12 F. Supp. 2d 1251, 1257 (M.D. Ala. 1998)). And, a plaintiff "may not sit back and accumulate all the discriminatory acts and sue on all within the statutory period applicable to the last one." *Moskowitz v. Trustees of Purdue University*, 5 F.3d 279, 282 (7th Cir. 1993). "A claim arising out of an injury which is 'continuing' only because a putative plaintiff knowingly fails to seek relief is exactly the sort of claim that Congress intended to bar by the 180-day limitation period." *Roberts*, 850 F.2d at 1550. *See also Hipp v. Liberty National Life Insurance Co.*, 252 F.3d 1208, 1222 (11th Cir. 2001); *Lane v. Ogden Entertainment*, 13 F. Supp. 2d 1261 (N.D. Ala. 1998).

To determine whether the otherwise time-barred claims raised by plaintiffs constitute continuing violations, courts in this Circuit have utilized the three-prong test articulated by the Fifth Circuit Court of Appeals in *Berry v. Board of Supervisors of L.S.U.*, 715 F.2d 971 (5th Cir. 1983). That test is succinctly stated as follows: "In order to determine whether otherwise barred claims fall within the continuing violation exception, courts consider whether the claims are related in subject matter and frequency and

whether the alleged violations were permanent in the sense that they served to trigger the employee's awareness that [his] civil rights had been violated." *Dudley v. Metro-Dade County*, 989 F. Supp. 1192, 1198 (S.D. Fla. 1997) (citing *Roberts*, 835 F.2d at 800-01; *Robinson v. Caulkins Indiantown Citrus, Co.*, 701 F. Supp. 208, 211 (S.D. Fla. 1988)). The plaintiff must prove that a substantial nexus exists between the discriminatory acts. *See Roberts*, 835 F.2d at 800; *Lewis*, 874 F. Supp. at 1303. In this Circuit, the most important factor in this analysis is "whether the act was sufficiently permanent in nature to 'trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate[.]'" *Watson v. Bally Manufacturing Corporation*, 844 F. Supp. 1533, 1535 (S.D. Fla. 1993) (quoting *Berry*, 715 F.2d at 981).

The Supreme Court recently made it clear that an employee may not recover for untimely discrete acts of discrimination, "even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act." *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, ___, 122 S. Ct. 2061, 2072, 153 L. Ed. 2d 106 (2002). The Court went on to note that "[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'" *Id.* at ___, 122 S. Ct. at 2073. Thus, the continuing violation doctrine is inapplicable with regard to a string of alleged incidents each of which would constitute a completed act

of clear discrimination, regardless of any connection to timely claims. *See, e.g., Hipp*, 252 F.3d at 1222 n. 12; *Roberts*, 835 F.2d 793 (holding that several sequential denials of promotion do not constitute a continuing violation). Applying this test to the instant cause of action, the undersigned finds that Plaintiff has not established a continuing violation.

A denial of promotion, as the Supreme Court noted in *Morgan*, is a discrete employment decision. In this case, the decision to award the GS-5 program analyst position to a younger, white male "was sufficiently permanent in nature to 'trigger [Plaintiff's] awareness of and duty to assert [ ] her rights[.]" *Watson*, 844 F. Supp. at 1535. Plaintiff testified that she believed at the time that this was a discriminatory decision by Mr. Curtis especially in light of how the vacancy arose. [Plaintiff's Dep. at 79-81]. According to Plaintiff, the position was first advertised in 1996 as a GS-7 Program Analyst, and she was rated and ranked as best qualified. At that point, the vacancy notice was withdrawn and re-announced in 1997 as the GS-5. [Plaintiff's Affidavit ¶¶ 7-9]. When Plaintiff questioned Mr. Curtis about the vacancy, he advised that the GS-7 was not filled because none of the applicants had accounting experience. According to Plaintiff, the vacancy announcement did not reference accounting experience. Plaintiff testified that she did not believe Mr. Curtis' explanation and that she, in fact, sought EEO counseling, ending up speaking with Mr. Clark, about the selection for the GS-5 position. [Plaintiff's Dep. at 80-81; Plaintiff's Affidavit ¶¶ 9-12, 15]. However, Plaintiff decided not to file a complaint. [Defendant's Statement of Material Fact ¶ 19; Plaintiff's Dep. at 41-42; Plaintiff's Affidavit ¶ 15]. This situation clearly fits within the category of claims

which trigger a plaintiff's duty to seek relief but for which a plaintiff decides, for whatever reason, not to seek relief. Such claims are barred. *See Hipp*, 252 F.3d at 1222. Having waited almost four (4) years (that is, from July 1997 to August 2001, when she filed her civil complaint in federal court), Plaintiff may not seek relief for this adverse employment decision.

For this reason, the court **RECOMMENDS** that Defendant's motion [Doc. 20] be **GRANTED** on Plaintiff's claim of discrimination with respect to the 1997 promotion decision.

IV. Conclusion

For the foregoing reasons and cited authority, this court **RECOMMENDS** that Defendant's motion [Doc. 20] for summary judgment be **GRANTED**.

The Clerk is **DIRECTED** to terminate this reference.

SO RECOMMENDED, this 26th day of MARCH, 2003.

/s/ Janet F. King
JANET F. KING
UNITED STATES
MAGISTRATE JUDGE